



# Immigration Law Advisor

March 2007 A Monthly Legal Publication of the Executive Office for Immigration Review Vol 1. No.3

*The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.*

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## **The Convention Against Torture: When does a Public Official Acquiesce to Torture Committed by a Third Party?**

*By Teresa Donovan*

In the eight years since aliens were first permitted to apply for protection under the Convention Against Torture (Convention) in removal proceedings, the Board has issued four precedent decisions interpreting the federal regulations implementing the Convention. See 8 C.F.R. §§ 1208.16-1208.18; *Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002)(Nigerian convicted of a drug offense in the United States failed to meet burden to establish eligibility for deferral of removal under Convention); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)(substandard prison conditions in Haiti do not constitute torture where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture, despite isolated instances of mistreatment); *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002)(Iranian Christian of Armenian descent demonstrated eligibility for deferral of removal under Convention); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). Of those decisions, none has resulted in more controversy than the Board's decision in *Matter of S-V-*, which interpreted the term "acquiescence" as used in the definition of torture and analyzed the extent to which the Convention protects persons from acts of torture inflicted by a third party.

In *S-V-*, the Board denied the respondent's motion to reopen to apply for protection under the Convention. An issue before the Board was whether the respondent demonstrated that non-governmental guerrilla groups committed torture with the acquiescence of the Colombian government. See 8 C.F.R. §§ 1208.18(a)(1), (7). The Board held that to establish the requisite acquiescence by a public official, the respondent must show that the Colombian officials *willfully accepted* the guerrillas' torturous acts.<sup>1</sup> The Board concluded "that a government's *inability to control a group* ought not lead to the conclusion that the government acquiesced to the group's activities." *Id.* at 1312 (emphasis added). The Board found that the respondent failed to

show that the “Colombian Government’s failure to protect its citizens is the result of deliberate acceptance of the guerrilla’s activities.” *Id.* at 1313 (emphasis added).

Several circuit courts have challenged the Board’s use of the term “willfull acceptance” to the exclusion of the term “willful blindness” when considering a government’s acquiescence. Although the Board did not specifically reject a willful blindness standard, the courts have found that was the Board’s determination. For example, in *Li Chen Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003), the Ninth Circuit reasoned that the Board adopted its own interpretation of the term acquiescence “that requires more than awareness. . .and seemingly excludes ‘willful blindness.’”

Since the Board’s decision in S-V-, eight circuit courts have adopted a “willful blindness” standard to determine whether a government acquiesces to the torturous acts of a private person or group.<sup>2</sup> See *Mouawad v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 750552 (8th Cir. 2007) (willful blindness sufficient to prove acquiescence); *Silva-Rengifo v. Attorney General*, 473 F.3d 58 (3rd Cir. 2007) (same); *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006) (same); *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005) (same); *Khouzam v. Ashcroft*, 361 F.3d 161 (2nd Cir. 2004) (same); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 241 (4th Cir. 2004) (same); *Li Chen Zheng v. Ashcroft*, *supra*, at 1195-1196 (9th Cir. 2003) (same); and, *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-355 (5th Cir. 2002) (same).

As these cases illustrate, some of the most difficult Convention claims to adjudicate are those in which persons committing torture are not public officials. The question is what sort of governmental act or inaction must be shown for a successful Convention claim where the perpetrator is a non-governmental entity. A quick look at the negotiating and legislative history of the Convention - with a focus on the term “acquiescence” - reveals that because the Convention deals with torture committed in the context of governmental authority - some volitional act or inaction by the government is required.

The implementing regulations at 8 C.F.R. §§ 1208.16-1208.18 find their origin in the initial proposed drafts of the Convention. From 1979 until 1984, a working group formed by the United Nations Commission on Human Rights met annually to draft a convention to protect persons against tor-

ture. Although 20 to 30 delegations attended the meetings, the United States was one of five states that participated in all the working group sessions.<sup>3</sup>

At the first working group session in February 1979, several substantive provisions, including the definition of torture, were discussed. An important question for the drafters of the convention was whether the definition of torture should extend only to acts committed by public officials. Most states agreed that the Convention should protect persons from torture inflicted by public officials as well as acts for which such officials “could otherwise be considered to have some responsibility.”<sup>4</sup> At the same time, most states agreed that the Convention should not extend to torturous acts committed wholly by private persons or groups.<sup>5</sup>

The United States’s proposals at this juncture indicate its view as to when public officials should be held responsible for acts of torture committed by third parties. The United States proposed defining torture as *any act. . . inflicted on a person by or with the consent or acquiescence of a public official*. It also proposed defining a public official - in relevant part - as one who *fails to take appropriate measures to prevent or suppress torture when such a person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in a position to take such measures*.<sup>6</sup>

The working group’s February 19, 1979, draft of the Convention did not include the United States’s definition of a public official. It did, however, incorporate the United States’s proposal regarding the torture definition. Torture was defined, in relevant part, as *any act. . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. The final version of the Convention, adopted by the United Nations General Assembly on December 10, 1984, defines torture using this language, as do the implementing regulations at 8 C.F.R. § 1208.18(a)(1), promulgated 20 years later.

The Convention’s legislative history, which spanned three administrations, reveals that Congress understood that the scope of the Convention is circumscribed to torture committed in a governmental context. The United States signed the Convention on April 18, 1988, and the following month, President Reagan transmitted the Convention with 17 conditions to the Senate for its consent.<sup>7</sup> President Reagan

transmitted the Convention with the understanding that *acquiescence of a public official requires that a public official, prior to the activity constituting torture, have knowledge of such activity and thereafter breach his legal responsibility to prevent such activity.*<sup>8</sup> In its report accompanying the President's transmittal, the State Department observed that the Convention protects against torture inflicted "under color of law."<sup>9</sup>

Subsequently, the first Bush administration proposed amending and reducing the number of conditions to 13 (three reservations, eight understandings, and two declarations). These conditions were incorporated into the Senate's resolution of advice and consent.<sup>10</sup> The Foreign Relations Committee (Committee) reported that these conditions "are the product of a cooperative and successful negotiating process between the executive branch, this committee, and interested private groups."<sup>11</sup>

Relevant to this discussion, is the Senate's revision of the understanding regarding the term acquiescence. In 1990, the Senate gave its consent to the Convention with the understanding that *acquiescence of a public official requires that a public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to prevent such activity.*<sup>12</sup> The Committee explained that it replaced the word "knowledge" with the word "awareness" to clarify that "both actual knowledge and willful blindness" fall within the meaning of acquiescence.<sup>13</sup> In its report, the Committee reiterated that the "Convention deals only with torture committed in the context of governmental authority; acts of torture committed by private individuals are excluded."<sup>14</sup>

President Clinton deposited the instrument of ratification, subject to these same conditions, with the United Nations on October 21, 1994. Four years later, he signed into law legislation that directed the Justice Department to establish a procedure for aliens in removal proceedings to apply for protection under the Convention "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."<sup>15</sup> As directed, implementing regulations were promulgated and became effective March 22, 1999.<sup>16</sup> The definition of torture at 8 C.F.R. § 1208.18(a)(1) mirrors the definition of torture in Article 1 of the Con-

vention. The term "acquiescence" defined at 8 C.F.R. § 1208.18(a)(7), is identical to the Senate's understanding of the term contained in its 1990 resolution of ratification.

In sum, from the drafting of the Convention in the United Nations in 1979, to its implementation in removal proceedings in 1999, the definition of torture has always been defined by the requirement that the acts of torture arise in a governmental context. Thus, in Convention cases where the torturer is not a public official, meaning of the term acquiescence is key to ascertaining whether the requisite government connection exists. For now, we have seen the courts move to a willful blindness test and we can expect to see a further evolution of this essential term acquiescence.

*Teresa Donovan is an Attorney Advisor with the BIA.*

<sup>1</sup> The Attorney General's decision in *Matter of Y-L-, A-G-, and R-S-R-*, 23 I&N Dec. 270, 283 (A.G. 2002) (finding that the relevant inquiry under the Convention is "whether governmental authorities would approve or 'willfully accept' atrocities committed against persons in the respondent's position"), employs the same "willful acceptance" standard.

<sup>2</sup> Of those circuits, the Second, Third, Sixth, and Ninth Circuits have specifically rejected the Board's decision in *S-V-* insofar as it held that acquiescence requires a showing of "willful acceptance." The Fourth, Fifth, Eighth and Tenth Circuits employed a "willful blindness" standard without specifically rejecting *S-V-*.

<sup>3</sup> See J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* 32 (1988).

<sup>4</sup> *Id.* at 45.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 41-42.

<sup>7</sup> S. Treaty Doc. No. 100-20, reprinted in 13857 U.S. Cong. Serial Set at 3 (1990) (State Department Summary).

<sup>8</sup> *Id.* at 4-5.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> See Report of the Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at 7 (1990) (Senate Report).

<sup>11</sup> *Id.* at 4.

<sup>12</sup> See 136 Cong. Rec. S17486-01 (1990).

<sup>13</sup> See S. Exec. Report 101-30, at 9.

<sup>14</sup> See S. Exec. Report 101-30, at 6.

<sup>15</sup> section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

<sup>16</sup> 64 Fed. Reg. 8478 (Feb. 19, 1999).

## FEDERAL COURT ACTIVITY

### The “Fugitive Disentitlement Doctrine” and Other Limits on Circuit Court Review

By Edward R. Grant

The word “trend” should be used cautiously, but a review of decisions during the first quarter of 2007 suggests that the Federal circuit courts of appeals are responding to their higher caseloads in part by taking a stricter view of matters of jurisdiction – including denying review to aliens who have absconded from final orders of removal by ignoring orders to report for removal.

These developments occur in the context of continued high affirmance rates for Board of Immigration Appeals decisions. As John Guendelsberger reports, the affirmance rate for February 2007 was 86 percent. For March, the rate is even higher, 92 percent, out of a total of 329 cases reported as of March 26. The overall rate for 2007 is slightly over 86 percent. Anecdotal reports, which we plan to report on more specifically in a future issue, suggest that the number of petitions for review (PFR) filed with the circuits is declining.

A partial explanation for these developments may be more assertive use by the circuits of jurisdiction-limiting rules not frequently encountered in immigration practice. One example is the “fugitive disentitlement doctrine,” cited recently by the United States Court of Appeals for the Sixth Circuit in dismissing a PFR involving an in absentia order of removal. *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007).

The petitioner in *Garcia-Flores* failed to appear at a May 2001 removal hearing, was ordered removed in absentia, and allegedly learned of this order in 2004. Denying a motion to reopen, the Immigration Judge found that proper notice was provided, a decision affirmed by the BIA on appeal. Subsequent to that order, the alien was served with a notice to report for removal by DHS, did not comply, and was taken into custody a year later.

The court dismissed the PFR, noting that under the fugitive disentitlement doctrine, it has previously dismissed appeals from criminal defendants who had fled the jurisdiction. Agreeing with *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729 (7th Cir. 2004), the court found this doctrine could be applied to the immigration context because aliens who abscond violate the principle of reciprocal obligations inherent in litigation: that each side will abide by the order of the court. The

petitioner, the court noted, adopted instead a “heads I win, tails you’ll never find me” approach, even though his subsequent arrest “foiled the effort.” Since the petitioner could have pursued his appeal even if removed to Mexico pursuant to *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 701 n.1 (6th Cir. 2005), he would not have lost his legal recourse by reporting for removal as ordered.

The Second Circuit, also in a published opinion, recently applied the doctrine to a case involving a motion to reopen (based on the changed personal circumstances of having two U.S. citizen children) filed in July 2005; the BIA had dismissed the petitioner’s prior appeal in December 1996 and he had received a notice to surrender for deportation in January 1998. *Gao v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 829063 (2nd Cir. Mar. 20, 2007).

Noting that it had “long held that the doctrine applies with full force to an alien who fails to comply with a notice to surrender for deportation,” *see Bar-Levy v. INS*, 990 F.2d 33, 35 (2d Cir.1993), the court cited several reasons for continuing to so hold. “Those reasons include the difficulty of enforcing any judgment rendered against a fugitive; the need for a sanction to redress the fugitive’s affront to the dignity of the judicial process; the desire to promote the efficient operation of the courts by deterring escape; and finally, the need to redress any prejudice to the government occasioned by the fugitive’s absence . . . . When a litigant becomes a fugitive during the pendency of an appeal to escape the effect of judgment, we have observed that any one of these rationales provides a sufficient basis for us to dismiss the appeal.” *Id.* at \*3.

The court found little difficulty in finding that these reasons would be served by applying the doctrine to bar petitioner Gao from further review. “Petitioner asserts that his marriage and the birth of his two children in the United States constitute changed circumstances sufficient to warrant reopening his motion for asylum and withholding of removal. While we do not reach the merits of this argument, we note that it rests largely on events of his own making that transpired while he was a fugitive. Allowing his motion to reopen to go forward would have the perverse effect of encouraging aliens to evade lawful deportation orders in the hope that, while they remain fugi-

tives, they may contrive through their own efforts a new basis for challenging deportation.” *Id.* at \*4.

In another case, the petitioner in *Bello-Tobon v. Gonzales*, 2007 WL 786365 (9th Cir. Mar. 16, 2007), appealed from a BIA decision affirming a denial of cancellation of removal, voluntary departure, and a requested continuance. Subsequent to filing the PFR, petitioner’s counsel sought to withdraw, and the government moved to dismiss the petition, saying that the petitioners had not provided a current address and were considered fugitives by the Department of Homeland Security. Citing the fugitive disentitlement doctrine, the Ninth Circuit granted the government’s motion, demonstrating that the doctrine can be applied even in the absence of an executed order to report for removal. See *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir. 2003) (doctrine applies to immigration proceedings where alien has absconded).

While not a new development, the concurrent affirmance of the fugitive disentitlement doctrine by three circuits suggests that jurisdictional arguments will

come to have greater importance in Federal immigration litigation. Other examples include numerous unpublished cases in which a variety of circuits, including the Second and Ninth, have dismissed PFRs because aliens have failed to exhaust or even present their arguments to the BIA. See, e.g., *Rong Chen v. Gonzales*, 2007 WL 841617 (2nd Cir. Mar 20, 2007); *Singh v. Gonzales*, 2007 WL 836701 (9th Cir. Mar. 15, 2007). Also noteworthy is the circuits’ general reluctance to give an expansive reading to language in the REAL ID Act, Pub. L. No. 109-13, Div. B., 119 stat. 231 (2005), conveying jurisdiction over “questions of law,” see *Serpil v. Gonzales*, 2007 WL 841591 (2nd Cir., Mar. 19, 2007), and the Seventh Circuit’s recent decision, cutting against the grain of some of its sister circuits, affirming the authority of the BIA to summarily dismiss an appeal where the alien has failed to file a brief after indicating that he or she would do so. *Kokar v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 610037 (7th Cir. Mar. 1, 2007).

***Edward R. Grant is a Board Member with the BIA.***

## CIRCUIT COURT DECISIONS FOR FEBRUARY 2007

*By John Guendelsberger*

In February 2007, electronic reporting services reported 440 circuit court decisions in petitions for review of Board decisions. The courts affirmed the Board in 378 cases and reversed in 62. The United States Court of Appeals for the Second and Ninth Circuits issued about 68 % of the total decisions and accounted for about 85 % of the reversals. All of the other circuits combined decided 141 cases and reversed in 9 (6.4 %). There were no reversals from the United States Court of Appeals for the First, Fifth, Seventh, and Tenth Circuits. The highest reversal rate was in the Second Circuit at 25.3%. The overall reversal rate of 14.1% for February is considerably down from the 19.1% reversal rate for January 2007 and well below the 17.5 % reversal rate for calendar year 2006.

The following chart provides the results from each circuit for February 2007 based on electronic service reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	2	2	0	0.0
2nd	91	68	23	25.3
3rd	35	32	3	8.6
4th	26	25	1	3.8
5th	13	13	0	0.0
6th	16	15	1	6.3
7th	7	7	0	0.0
8th	14	12	2	14.3
9th	198	168	30	15.2
10th	5	5	0	0.0
11th	33	31	2	6.1
All:	440	378	62	14.1

The Second Circuit reversed in 23 of its 91 cases (25.3%). This was a slow month for the Second Circuit which has averaged about 150 cases per month over the last year. As usual, most of the Second Cir-

cuit reversals involved asylum issues: flawed credibility determinations (6); incomplete analysis of nexus (3); whether cumulative harm amounted to persecution (4); failure of the Board to explain, in reversing an Immigration Judge's grant of asylum, how it was that the Immigration Judge's findings were "clearly erroneous"; flawed finding that application was frivolous (1). The Court also remanded three cases for further consideration of claims to a well-founded fear of persecution based on birth of a second child in the United States and one Convention Against Torture claim in which it was unclear whether the Board applied the "willful blindness" standard for governmental acquiescence. The Court also ruled that an alien who arrived 15 minutes late for a hearing did not fail to appear under the provisions for in absentia orders of removal.

The Ninth Circuit reversed in 30 of 198 cases (15.2 %). About half of the reversals involved asylum issues: credibility (7); past persecution level of harm (2); nexus (3); failure to address reasonableness of internal relocation (1); failure to address "pattern and practice" aspect of well-founded fear (1); and, failure to fully address changed country conditions. Several of the

Ninth Circuit reversals involved petitions for review of denials of motions to reopen in which the Court found that issues related to ineffective assistance of counsel and equitable tolling were not sufficiently addressed. Two reversals involved application of the categorical and modified categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), in determining whether a conviction fit within the removal provision charged.

The three reversals in the Third Circuit involved application of the "willful blindness" standard for governmental acquiescence under the Convention Against Torture; denial of a motion to reopen an in absentia order of removal which failed to address fully the question of notice of the hearing; and the question whether an alien was "trafficking" in a controlled substance within the meaning of section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), when the record did not indicate whether the respondent was manufacturing drugs for personal use or for commercial purposes.

*John Guendelsberger is the Senior Legal Advisor to the BIA Chairman.*

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## Recent Circuit Court Decisions

### *Second Circuit*

*Abu Hasirah v. Department of Homeland Security*, \_\_\_ F.3d \_\_\_, 2007 WL 532584 (2d Cir. Feb. 22, 2007) The Court held that the alien's unintentional lateness to the removal proceedings by 15 minutes did not constitute a failure to appear within the meaning of section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1229a(b)(5), and that it was legal error for the agency to apply the in absentia statutory provisions to the alien.

The Court reasoned that "Congress's choice of words, specifying the consequences when an alien 'does not attend' a proceeding, coupled with the grave consequences Congress attached to that circumstance, strongly suggest that Congress did not intend the provisions of section 1229a(b)(5) to apply to a brief, innocent and understandable tardiness. We believe the provision for virtually non-revocable in absentia orders of removal was intended for the more serious case of an alien who failed entirely to appear for a hearing."

The Court referred to similar decisions in the First, Third, and Fifth circuits which also distinguish between late appearances and failure to appear. *Herbert v. Ashcroft*, 325 F.3d 68 (1st Cir. 2003); *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005).

*Siewe v. Gonzalez*, \_\_\_F.3d\_\_\_, 2007 WL 744732 (2d Cir. Mar.13, 2007) (Republic of Cameroon) The denial of asylum, withholding of removal, and relief under the Convention Against Torture is affirmed over claims that the Immigration Judge's adverse credibility finding is not supported by substantial evidence since the Immigration Judges erroneously resorted to speculation and conjecture when assessing the evidence, and since any inconsistencies relied upon by the Immigration Judge are immaterial and easily and reasonably explained. The court held that the adverse credibility finding was supported by substantial evidence where the alien submitted a suspect document and other inconsistencies existed in his testimony.

### **Third Circuit**

*Atkinson v. Attorney General of the United States*, \_\_\_ F.3d \_\_\_, 2007 WL 706586 (3d Cir. March 8, 2007) The Third Circuit Court of Appeals rejected the distinction between aliens who entered into plea agreements and aliens who proceeded to trial and were found guilty for purposes of former section 212(c) of the Act, 8 U.S.C. § 1182 nonretroactivity. In *Atkinson*, the alien had been convicted after a 1991 jury trial of drug offenses which rendered him removable under sections 237(a)(2)(B)(i) and (A)(iii) of the Act, 8 U.S.C. §§ 1227(a)(2)(B)(i) and (A)(iii). The court held that the Board erred in finding that he could not apply for a 212(c) waiver of his offenses.

In a previous decision, *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), the Third Circuit held that it was impermissible to apply the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132, 110 Stat. 1214 and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. No. 104-208, 110 Stat. 3009-546 retroactively to aliens who had been offered pleas but had rejected them in reliance upon availability of a 212(c) waiver in the event of a conviction. *Ponnapula* included dicta suggesting that the court might not find sufficient reliance in the case of an alien who had not been offered a plea agreement prior to proceeding to trial. *Atkinson* removes any such distinction and establishes a categorical rule extending nonretroactivity of the IIRIRA 212(c) repeal to all pre-IIRIRA convictions. For the Third Circuit, the crucial consideration for nonretroactivity analysis is whether the IIRIRA repeal of 212(c) attached new consequences to the alien's conviction. Here the new legal consequence was that the 212(c) repeal meant "the certainty -- rather than the possibility -- of deportation."

The Tenth Circuit has precluded retroactive application of 212(c) for aliens who proceeded to trial and then relinquished a right to appeal based on a risk of losing 212(c) availability were they to prevail on appeal, be retried and then sentenced to a term that would preclude 212(c) availability. *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006).

The Second and Fifth Circuits have held that 212(c) remains available to an alien who has been convicted after proceeding to trial, when the alien can show that he or she in fact relied upon 212(c) in postponing an application for 212(c) from DHS in or-

der to acquire additional equities. See *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006) (requiring an individualized showing that reliance on availability of 212(c) relief was a factor in postponing application for 212(c) from DHS); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) (212(c) available if alien could show that she "affirmatively decided to postpone her 212(c) application to increase her likelihood of relief," thus establishing a "reasonable 'reliance interest' in the future availability of 212(c) relief comparable to that of applicants in *St. Cyr*.").

### **Fourth Circuit**

*Perez-Vargas v. Gonzales*, 478 F.3d 191, (4th Cir, 2007), The Court vacated the Board's decision in *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), in which the Board held that an Immigration Judge lacks authority to determine whether the validity of an alien's approved employment based visa petition is preserved under section 204(j) of the Act, 8 U.S.C. § 1154(j) after the alien's change in jobs or employers.

The court found that the section 204(j) determination is within the Immigration Judge's jurisdiction, reasoning that "[b]ecause an Immigration Judge has 'exclusive jurisdiction' to adjudicate an application for adjustment of status, he necessarily has jurisdiction to make a section 204(j) determination, which is simply an act of factfinding incidental to the adjustment of status process." Cf. 8 C.F.R. 1240.1(a)(1)(iv) (providing that an Immigration Judge has authority "[t]o take into account any other action consistent with applicable law and regulations as may be appropriate.")

### **Seventh Circuit**

*Terezov v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 764287 (7th Cir. March 15, 2007) The petitioner, a national of Bulgaria, was ordered removed in absentia when he failed to appear at his removal hearing. He moved to reopen claiming that he never received the hearing notice which was sent to an address at which he no longer lived. The Immigration Judge and Board found that the DHS mailed the notice to the last address provided by the alien in Indiana, evidenced by a change of address form submitted by the alien. The alien claimed that he had notified the Los Angeles asylum office of his move to Phoenix ten months before the notice to appear was mailed to a prior address, and provided two return receipts. On appeal, the court found that

the administrative record was so incomplete that it was impossible to tell if the notice was mailed and if so, to what address. The return receipts that the alien consistently claimed were from his change-of-address forms he sent to the Los Angeles asylum office provided strong circumstantial evidence that he informed that office of his return to Phoenix. Documents that the alien received from the United States Citizenship and Immigration Services concerning his application for work authorization conclusively demonstrated that the alien updated other DHS offices about his whereabouts.

### *Ninth Circuit*

*Oria v. Gonzales*, 2007 WL 495193 (9th Cir. Feb. 14, 2007)(unpublished), The Ninth Circuit found no res judicata bar where respondent was first charged as an alien convicted of two crimes involving moral turpitude (CIMT) in deportation proceedings and then subsequently charged as an arriving alien with two CIMTs.

The alien was initially placed in deportation proceedings and charged with double CIMTs under former section 241(a)(2)(A)(ii) of the Act. The Immigration Judge terminated proceedings after finding that the two CIMTs arose out of a single scheme of criminal misconduct. A few years later the respondent

was charged (based on the same two CIMTs) as an arriving alien who committed two CIMTs such that the “petty offense” exception of section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii) was inapplicable.

In rejecting the respondent’s res judicata argument, the Ninth Circuit concluded that “[t]he present proceedings do not involve the same claim that was raised in the 1991 deportation proceedings....The inadmissibility claim could not have been brought in 1991 because Oria was not at that time an arriving alien. Also, the claims are different because the prior claim was subject to the ‘single scheme’ limitation, whereas the current claim is not so limited. Therefore, res judicata does not apply to preclude the government’s reliance on the 1987 theft convictions.”

Notably, Oria was issued just after the Ninth Circuit’s decision in *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007), holding that DHS was barred by res judicata from instituting a second deportation case when, due to a change of law that occurred during the course of the first case, the Board had vacated the Immigration Judge’s removal order and terminated removal proceedings.

## BIA PRECEDENT DECISIONS

In *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007), the Board found that Immigration Judges have jurisdiction to adjudicate de novo an alien’s application for Temporary Protected Status (TPS) even if the application has previously been denied by DHS. The Board reasoned that the plain language of the Immigration and Nationality Act makes clear that an alien is permitted to assert his right to TPS in removal proceedings, which must be read as providing a de novo determination. Section 244(b)(5)(B) of the Act, 8 U.S.C. § 1254a (b)(5)(B)(2000).

In *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007), the Board revisited the issue of under what circumstances the Board and the Immigration Judges may terminate proceedings when a respondent has a pending naturalization application. Under 8 C.F.R. § 1239.2(f)(2006), an Immigration Judge may terminate removal proceedings when an alien has es-

tablished prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. The Board found that because the Board and Immigration Judges lack jurisdiction to adjudicate naturalization applications, neither can determine prima facie eligibility. DHS must communicate affirmatively that the alien is prima facie eligible for naturalization. This decision reaffirms the Board’s holding in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975).

In this case, DHS adjudicated the naturalization application even though it does not have authority to do so when removal proceedings are pending. The Board found that DHS’ adjudication of the application is not an affirmative communication. The Board noted that Congress limited DHS’s authority to adjudicate naturalization applications while an alien is in removal proceedings to prevent a race between the alien to gain citizenship and the Attorney General to deport him.

Lastly, the Board acknowledged that it does not have the authority to compel DHS to acknowledge the respondent's eligibility for naturalization which permits DHS to prevent termination by its silence. However, to decide otherwise would place Immigration Judges and the Board in the position of rendering decisions on an issue over which they do not have ultimate jurisdiction and for which they do not have expertise.

In *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007), the Board discussed the analysis to be used in determining whether an offense is an aggravated felony under section 101(a)(4)(K)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(K)(ii) (2000), offenses described in 18 U.S.C. §§ 2421, 2422, 2423 relating to transportation for the purpose of prostitution "if committed for commercial advantage". Analysis of this aggravated felony ground of removability requires a two-step inquiry: whether the alien was convicted of an offense described in the sections specified, and whether the offense was committed for commercial advantage. The Board found that the first step must be made by reference to the record of conviction alone, while the second step requires an additional inquiry into the conduct underlying the offense.

The Board highlighted the distinction in the Act between crimes *committed* by an alien and crimes for which an alien is *convicted*. When the statute directs a focus on the conviction, the inquiry is restricted to the evidence in the record of conviction in the manner described in *Taylor v. United States*, 495 U.S. 575 (1990). This statute uses the language "*committed*." Congress amended this aggravated felony definition in 1996 to include the committed language, indicating an intent that the circumstances of the crime be considered. Furthermore, the statute at issue, 18 U.S.C. § 2422, does not have as an element that the crime be committed for commercial advantage. If the inquiry was limited to the elements of the crime, the provision would have an extremely limited scope. Lastly, other aggravated felony provisions include requirements that extend beyond the elements of the offense. To give effect to the commercial advantage provision, the parties must be able to offer evidence outside the strict confines of the record of conviction. The Board found that this provision can be ascertained by the record of conviction, the presentence report, the respondent's own admissions, and any other relevant evidence.

In *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007) the Board weighed in on an Immigration Judge's authority to reinstate a prior deportation order under the reinstatement provisions of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The respondent in this case was deported from the United States following deportation proceedings in 1992. He reentered the United States, and in 2005 removal proceedings were initiated against him. While proceedings were pending, DHS moved for reinstatement of the respondent's prior order of deportation under section 241(a)(5). The Immigration Judge terminated proceedings without prejudice.

The Board found that the regulations clearly set forth that an immigration officer is authorized to reinstate a prior deportation, and an alien has no right to a hearing before an Immigration Judge. 8 C.F.R. § 1241.8(a). The respondent challenged the regulation as contrary to the right to a hearing set forth in section 240(a) of the Act, 8 U.S.C. § 1229a(a). This argument was rejected by the United States Court of Appeals for the Ninth Circuit sitting en banc in *Morales-Izquierdo v. Gonzales*, 477 F.3d 691 (9th Cir. 2007). The Board agreed with the court, which reasoned that the reinstatement and removal provisions of the Act are in separate sections and the reinstatement provisions describe limited proceedings and rights. Further, an alien has already had a full hearing. Lastly, the Board found that once the notice to appear is served, the Immigration Judge has exclusive authority to terminate proceedings, and may do so when proceedings are improvidently begun. The availability of reinstatement is a valid reason to terminate proceedings.

In a bond case, *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007), the Board addressed the mandatory detention provisions of section 236(c)(1) of the Act, 8 U.S.C. § 1226(c)(1). The Board first found that an alien who has been apprehended at home while on probation for criminal convictions, rather than released directly from criminal custody, "is released" from criminal custody within the meaning of section 236(c)(1), provided the release is after the expiration of the Transition Period Custody Rules (TPCR). The Board then found that an alien need not be charged with the ground that provides the basis for mandatory detention in order to be subject to the mandatory detention provision. Section 236(c)(1)(B) provides that an alien is subject to mandatory detention if the alien "is deportable" under section 237(a)(2)(A)(ii) of the

Act, 8 U.S.C. § 1227(a)(2)(A)(ii)(two crimes involving moral turpitude). In this case, the respondent was only charged with removability under section 237(a)(1)(B), but admitted to convictions for two crimes involving moral turpitude. The Board previously found that the “is deportable” language in the TPCR does not require that an alien be charged with and found deportable on the ground that provides the basis for mandatory detention. *Matter of Melo*, 21 I&N Dec. 833 (BIA 1997). The Board will look to the record to determine whether it establishes that the alien committed an offenses, and whether DHS is not substantially unlikely to establish that the offense would support a charge of removability included in the mandatory detention provision. See *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). The Board concluded that the respondent must be given notice of the circumstances or convictions that provide the basis for mandatory detention and an opportunity to challenge the detention

## REGULATORY UPDATE

### 72 Fed. Reg 10061 (2007)

#### DEPARTMENT OF STATE

#### **Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended**

**SUMMARY:** This final rule amends the Department of States regulations related to students and exchange visitors to reflect changes introduced by Public Law 108-441, and numerous administrative and procedural changes that have occurred with respect to these paragraphs following the transfer of the exchange visitor INA 212(e) waiver authority in 1999 from the United States Information Agency (USIA) to the Bureau of Consular Affairs in the Department of State. A number of these changes are non-substantive (i.e., agency name changes [the Department of Homeland Security in place of the Immigration and Naturalization Service], updating of office designations, etc.). Other changes reflect statutory amendments regarding waivers for the exchange visitor physicians and the proposed reconstitution of the Exchange Visitor Waiver Review Board. **DATES:** This rule is effective on March 2007.

### 72 Fed. Reg 10541 (2007)

#### DEPARTMENT OF HOMELAND SECURITY U.S. Citizenship and Immigration Services

#### **Extension of the Designation of Sudan for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Sudanese TPS Beneficiaries.**

**SUMMARY:** This Notice alerts the public that the designation of Sudan for Temporary Protected Status (TPS) has been extended for 18 months to November 2, 2008, from its current expiration date of May 2, 2007. This Notice also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of Sudan and whose application has been granted or remains pending. Certain nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. Given the timeframes involved with processing TPS re-registrants, the Department of Homeland Security (DHS) recognizes that re-registrants may not receive a new EAD until after their current EAD expires on May 2, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Sudan for six months, through November 2, 2007, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the November 2, 2008 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD. **DATES:** The extension of the TPS designation of Sudan is effective May 3, 2007, and will remain in effect until 11:59 p.m. on November 2, 2008. The 60-day re-registration period begins March 8, 2007, and will remain in effect until May 7, 2007. To facilitate processing of their applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period beginning on March 8, 2007.

## LEGISLATIVE UPDATE

 On March 22, 2007, Representatives Luis V. Gutierrez (D-IL) and Jeff Flake (R-AZ) introduced the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE ACT of 2007). Among other things, the bill will create a new temporary worker program, stiffen worker verification procedures, and overhaul the visa system to reduce waiting times for legal immigrants. The bill also contains provisions for increased border enforcement and a requirement for undocumented aliens to return to Canada, Mexico, or their home country before becoming eligible for permanent resident status.

There are some EOIR-specific provisions in the bill, though none as far-reaching as those in last year's Senate-passed bill, S. 2611 (i.e., restructuring of the BIA is not addressed, nor is streamlining). The bill

calls for 100 new Immigration Judges, 400 support staff for the Immigration Judges, 50 new BIA staff attorneys, and 50 support staff for the BIA between FY 2008 and 2012. The bill also calls for an expansion of the Legal Orientation Program to cover all detained aliens. Other provisions throughout that affect EOIR to varying degrees include the apparent removal of OCAHO jurisdiction from employer sanction appeals; changes in detention, voluntary departure, and background check procedures; and increases in staffing at DOJ (beyond EOIR) and DHS. Additionally, the bill enhances penalties for certain crimes that will add new grounds for removal and calls for increases in detention space.

A Senate bill, based on S. 2611, is expected to be introduced shortly.

### ***EOIR Immigration Law Advisor***

**Juan P. Osuna, Acting Chairman**  
*Board of Immigration Appeals*

**David L. Neal, Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Karen Drumond, Editor**  
(703) 605 - 1102  
*EOIR Law Library*

**Jean King, Senior Legal Advisor**  
(703) 605-1744  
*Board of Immigration Appeals*

**Anne Greer, Assistant Chief Immigration Judge**  
(703) 305-1247  
*Office of the Chief Immigration Judge*

**Layout by: Hasina Rahman, Kimberly Camp, & Kathy Edwards**